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国际条约解释中的“嗣后惯例规则”及其发展  
——兼论其在 WTO 体制中的适用

Subsequent Practice Rule in International Treaty

Interpretation and Its Development

——On Its Practice in WTO System

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## 内容摘要

嗣后惯例是条约解释的重要因素，在条约随时间演变方面起到十分重要的作用。国际司法实践为研究嗣后惯例规则提供了丰富的素材。本文拟通过几个主流国际法庭的相关实践来分析嗣后惯例，重点讨论嗣后惯例规则在国际司法实践中的发展趋势。

本文除引言和结语外，主要分为以下几个部分：

第一部分以《公约》签署之前的相关讨论为依据对嗣后惯例规则进行界定。简述了嗣后惯例从仅作为辅助解释资料到权威解释因素，并最终否定其非正式修约价值的历程，并据此界定了其“嗣后”、“惯例”及“协定”三个评价因素。同时，通过澄清嗣后惯例与辅助解释资料之间的分明界限，进一步明确了嗣后惯例规则的标准。但由于嗣后惯例规则本身的模糊性，有些问题仍留待实践中解决。

第二部分以国际法庭（WTO 争端解决机构除外，下同）适用嗣后惯例规则的适用现状为依据，论证其软化趋势。在以条约缔约国数量为标准进行分类的基础上，考察了国际法庭在适用嗣后惯例规则分别解释边界条约、双边投资条约等双边条约及人权条约、国际组织基本文件等多边条约时的不同表现。国际司法实践倾向于赋予不构成嗣后惯例，但仍具有很大程度一致性的缔约国嗣后实践以类似嗣后惯例的价值，这从某种程度上软化了嗣后惯例规则的标准。

第三部分从典型案例出发，指出 WTO 争端解决机构的两步分析法存在过于严苛的弊端，而考虑机构实践及适用三步分析法可能有助于缓解这一问题。

**关键词：**嗣后惯例；条约解释；三步分析法

## ABSTRACT

Subsequent Practice, as an important element of treaty interpretation, plays a very important role in the evolution of treaties over time. International judicial jurisprudence provide a wealth of material for the research on Subsequent Practice. This paper focus mainly on the development tendency of Subsequent Practice Rule reflected in the jurisprudence by several major international courts.

In this paper, in addition to the Preface and Conclusion, it is divided into the following chapters:

The first chapter defines the Subsequent Practice Rule with the discussions and cases before the "Convention" signed. This Chapter firstly introduces the history of Subsequent Practice from only as a supplementary means of interpretation to an authoritative interpretation factor and ultimately refused its informal modification function, and thus defines its three elements as "subsequent", "practice" and "agreement". At the same time, taking its clear distinction with supplementary means of interpretation into account, we can further clarify the internal standard of Subsequent Practice Rule. However, due to the ambiguity of Subsequent Practice Rule, there are several issues remained to be resolved in practice.

The second chapter tries to demonstrate the softening trend of Subsequent Practice Rule on the basis of its status quo in jurisprudence by international courts (except WTO dispute settlement body, the same below). Roughly classfying the treaties as bilateral and mulilateral on the basis of State Parties to the Treaty, this chapter examines their differences when the Subsequent Practice Rule is applied by international courts separately to interpret bilateral treaties such as Boundary Treaties, Bilateral Investment Treaties,etc, and mulilateral treaties such as Constitutional Treaties of International Organization, human rights treaties, etc. International judicial practice support that practices of State Parties with great degree of consistency, which don't meet the standard of Subsequent Practice Rule, have beening used as Subsequent Practice, which to some extent implies a softening tendency of

Subsequent Practice.

Basing on the typical cases, the third chapter points out the disadvantages of the Two-step Analysis concluded by the WTO Dispute Settlement Body. The standard set by Two-step Analysis is too harsh. Accordingly, taking organs' practice into consideration and the adoption of the Three-step Analysis may be helpful for the relieve of the impasse.

**Key Words:** Subsequent Practice; Treaty Interpretation; Three-step Analysis

## 缩略语表

### Abbreviations

ACHR	American Convention on Human Rights 《美洲人权公约》
BIT	Bilateral Investment Treaty 双边投资条约
ECHR	European Convention on Human Rights 《欧洲人权公约》
ECtHR	European Court of Human Rights 欧洲人权法院
HRC	Human Rights Committee 人权委员会
IACtHR	Inter-American Court of Human Rights 美洲国家间人权法院
ICCPR	International Convention on Civil and Political Rights 《公民权利与政治权利公约》
ICJ	International Court of Justice 国际法院
ICSID	International Center for Settlement of Investment Disputes 解决投资争端国际中心
NAFTA	North American Free Trade Agreement 《北美自由贸易区协定》
UNCITRAL	United Nations Commission on International Trade Law 联合国国际贸易法委员会
WHO	World Health Organization 世界卫生组织
WTO	World Trade Organization 世界贸易组织

## 案例表

**Table of Cases**

机构	裁定信息	年份
ICJ	Case Concerning Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J. Report of Judgment [2014]	2014
ICJ	Case concerning Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece) , I.C.J. Report of Judgment [2011]	2011
ICJ	Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Report [2004]	2004
ICJ	Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia), I.C.J. Report of Judgement [1999]	1999
ICJ	Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Report of Judgment [1997]	1997
ICJ	Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Report [1996]	1996
ICJ	Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Report [1996]	1996
ICJ	Case concerning Territorial Dispute (Libyan Arab Jamahiriya v. Chad), I.C.J. Report of Judgement [1994]	1994
ICJ	Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Report [1989]	1989



ICJ	Legal Consequences for States of the Continued Presence of South African Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Report [1971]	1971
ICJ	Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Report of Judgment [1962]	1962
ICJ	Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports [1962]	1962
ICSID	Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No ARB/07/26, Decision on Jurisdiction	2012
ICSID	Telefonica v. Argentina, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction	2006
ICSID	Gas Natural SDG, S.A. v. Argentina Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction	2005
ICSID	Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction	2005
ICSID	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction	2005
ICSID	CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction	2003
UNCITRAL	Canadian Cattlemen for Fair Trade (CCFT) v. United States of America, UNCITRAL Arbitration Under NAFTA Chapter Eleven, Award on Jurisdiction	2008

UNCITRAL	National Grid PLC v. The Argentine Republic, UNCITRAL, Decision on Jurisdiction	2006
UNCITRAL	CME Czech Republic B.V. v. the Czech Republic, UNCITRAL Arbitration, Final Award	2003
ECtHR	Al-Saadoon and Mufdhi v. the United Kingdom, ECtHR, 2010	2010
ECtHR	Schalk and Kopf v. Austria, ECtHR, 2010	2010
ECtHR	Öcalan v. Turkey, ECtHR, 2005	2005
ECtHR	Christine Goodwin v. the United Kingdom, ECtHR, 2002	2002
ECtHR	Loizidou v. Turkey, Preliminary Objections, ECtHR, 1995	1995
ECtHR	Soering v. the United Kingdom, Award, 1989	1989
ECtHR	Johnston and others v. Ireland, ECtHR, 1985	1985
ECtHR	Dudgeon v. the United Kingdom, ECtHR, 1981	1981
ECtHR	Tyrer v. United Kingdom, ECtHR, 1978	1978
IACtHR	Article 55 of the ACHR, IACtHR, Advisory opinion, 2009	2009
IACtHR	Serrano-Cruz Sisters v. El Salvador, IACtHR Preliminary Objections, 2004	2004
IACtHR	Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago, IACtHR, Judgments (Merits, Reparations and Costs, Judgment), 2002	2002
IACtHR	Mayagna (Sumo) Awas Thngni Community v. Nicaragua, IACtHR, Merits, Reparations and Costs, Judgment, 2001	2001
IACtHR	Velasquez-Rodriguez v. Honduras, IACtHR, Merits, 1988	1988
HRC	Osiyuk v. Belarus, Communication No.1311/2004, Views adopted on 30 July 2009	2009
HRC	Judge v. Canada, Communication No. 829/1998, Views adopted on August 2002	2002
HRC	Simms v. Jamaica, Communication No. 541/1993, Views adopted on 3 April 1995	1995

HRC	Kindler v. Canada, Communication No. 470/1991, Views adopted on 30 July 1993	1993
HRC	Barrett and Sutcliffe v. Jamaica, Communication No. 270/1980, Views adopted on 30 March 1992	1992
HRC	Van Duzen v. Canada, Communication No.50/1979, Views adopted on 7 April 1986	1986
HRC	Setelich v. Uruguay, Communication No.63/1979, Views adopted on 28 October 1981	1981
WTO	WT/DS294/AB/R:US-Zeroing (EC) Report of the Appellate Body	2006
WTO	WT/DS294/R:US-Zeroing (EC) Report of the Panel	2005
WTO	WT/DS269/AB/R:EC-Chicken Cuts (Brazil) Report of the Appellate Body	2005
WTO	WT/DS285/AB/R:US-Gambling (Antigua and Barbuda) Report of the Appellate Body	2005
WTO	WT/DS207/AB/R:Chile-Price Band System (Argentina) Report of the Appellate Body	2002
WTO	WT/DS207/R:Chile-Price Band System (Argentina) Report of the Panel	2002
WTO	WT/DS8/AB/R:Japan-Taxes on Alcoholic Beverages II (EC) Report of the Appellate Body	1996
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## 引 言

国际条约具有稳定性和确定性特征,能够为国际法律关系提供明确指引。然而,随着条约外部环境的发展变化,新的情况和国际社会需求对条约适应性提出了要求,要求条约必须随时间流逝而发展变化。而各国通过正式程序缔结或修改条约,尤其是多边条约越来越困难,甚至在很多情况下难以实施。世界贸易组织(World Trade Organization, WTO)多哈回合谈判的失败正反映了多边条约谈判和修约过程的困境。在此种情形下,继续保持条约最佳效力的一个重要途径就是重新解释条约。考虑到缔约方在解释其所缔结条约方面显著和持续的作用,嗣后协定和惯例在此情形下便是一种重要且常见的选择。而“嗣后惯例”旨在找到一种灵活同时又是理性和可预测的条约解释方法,在条约随时间演变方面起到更为重要的作用。<sup>①</sup>

国际社会已经认识到缔约方嗣后实践行为对条约解释和条约发展的影响。联合国国际法委员会(以下简称“委员会”)于2008年决定对“条约随时间演变”进行专题研究,并于2012年决定把该议题限定在嗣后协定和嗣后惯例的法律意义上,在已有研究基础上深化“与条约解释相关的嗣后协定和嗣后惯例”的研究。<sup>②</sup>目前,该工作组已就上述专题作出了三份研究报告。报告详细论述了嗣后惯例的构成要素及其在国际司法实践中的适用现状,但仍对适用嗣后惯例的某些问题语焉不详,例如不同类型的条约是否影响嗣后惯例的具体适用。<sup>③</sup>

近年来,我国部分学者也开始关注条约解释中嗣后惯例解释因素。我国学者主要从ICJ(International Court of Justice, ICJ)<sup>④</sup>、WTO争端解决机构<sup>⑤</sup>适用嗣

<sup>①</sup> Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Report of Judgment [1997], para.104.

<sup>②</sup> 报告并未指出嗣后惯例所具有的形式和价值,及各方按照第31.3条规定就条约解释达成“协定”的条件。参见:GEORG, NOLTE. Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (A/CN.4/671) [R], International Law Commission, 2014, para.2.

<sup>③</sup> 委员会认为,“从国际法院的判例中得出以下结论为时过早:文书的特性和主题的性质作为条约目的和宗旨当中的因素,并不影响嗣后协定或嗣后惯例在条约解释中的相对重要性”。参见:Georg, Nolte. First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (A/CN.4/660) [R], International Law Commission, 2013, para.53.

<sup>④</sup> 例如,韩燕熙在其论文中考虑了ICJ及其前身的相关实践。参见:韩燕熙.论条约解释中的嗣后实践[J].国际法研究,2014,(1):49-51.孟毅也在其硕士学位论文中试图通过考察ICJ相关案例说明嗣后惯例的非正式修约价值。参见:孟毅.条约解释中的嗣后惯例研究(硕士学位论文)[D].重庆:西南政法大学,2013:9-12.

<sup>⑤</sup> 例如,马寿波通过介绍WTO适用嗣后惯例的典型案列,论述了“一致、普遍、连贯”标准在WTO案列中的适用。参见:马寿波.《维也纳条约法公约》第31.3条“subsequent practice”研究[J].西南政法大学学报,2014,16(2).吕洁也在其硕士学位论文中重点考察了WTO争端解决机构适用嗣后惯例的典型案列。参



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